IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 8572 of 2004
With
CRIMINAL MISC.APPLICATION No. 8573 of 2004
To
CRIMINAL MISC.APPLICATION No. 8577 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Applicant(s)

Versus

BABUBHAI SOMABHAI GAMIT - Respondent(s)

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Appearance :

MR. A.D. OZA, PUBLIC PROSECUTOR WITH MR. PR ABICHANDANI. LD. APP for Petitioner No(s).: 1.

MR BB NAIK for Respondent No(s).: 1.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 24/08/2005

CAV COMMON JUDGMENT :

1. By filing present Cri. Misc. Applications under section 439(2) of CrPC, the petitioner State has prayed

for cancellation of bail granted to the respondents accused by the Court of Sessions i.e. ld. Sessions Judge, Surat vide order dated 01.09.2004 in exercise of powers vested with the Court under section 439 of Criminal Procedure Code in connection with the crime registered with DCB Police Station being I.CR No.52/2004 regarding the bank scam of The Suryapur Co.Op. Bank Ltd., Surat (hereinafter referred to as the Bank).

(2) It emerges from record that more than one offence has been registered by DCB Police Station, Surat i.e. CR Nos. I.8/2003, I.52/2004 (relevant for present judgment), I.55/2004 and 56/2004 for the offences punishable mainly under sections 406, 408, 409, 418, 420, 34 & 120-B of IPC. Respondents accused were the Directors, persons connected with the management of the Bank and are found, as per the allegations made by the prosecution, responsible as active participants of each resolution passed by the Board of Directors of the Bank in the fictitious names and in granting over-draft facility (OD facility for short) including disbursement of the amounts so sanctioned with ulterior motive. Placing reliance on certain details of bank accounts, operated and adjusted on the strength of OD facility granted for the loans sanctioned in the fictitious names, it is argued that all

have under a conspiracy cheated the Bank and its depositors. For the sake of brevity and convenience, I would like to refer to number of crimes registered against the respondents accused and the bail applications granted by the ld. Sessions Judge, Surat and/or by this Court along with date of grant of bail and other details:

CR.M.A NO.	Name of Accused	C.R. No.	Date of Arrest	Date of Bail	Remarks (amount of bail)
8572/ 2004	Babubhai S. Gamit	I-08/2003 I-52/2004	10/04/2004 12/08/2004	05/05/2004 01/09/2004	Rs.50,000/
8574/ 2004	Rajnikant.G.Desai	I-52/2004	12/08/04	01/09/04	Rs.50,000/-
8573/ 2004	Sureshbhai.K.Boricha	I-52/2004	12/04/04	01/09/04	Rs.50,000/-
8575/ 2004	Dr.Ranjitsingh J. Solanki Dr.Gulabsinh.F. Thakore.	I-08/2003 I-52/2004	12/08/2004	21/07/03 01/09/2004	By H.C. Rs.50,000/
8576/ 2004	Naynaben.B. Bhatt	I-52/2004	12/08/04	01/09/04	Rs.50,000/-
8577/ 2004	Jashwantisnh F. Vansia	I-52/2004	12/08/04	01/09/04	Rs.50,000/-

3. I have heard ld. APP Mr. PR Abichandani for the petitioner State of Gujarat, ld. Counsel Mr. BB Naik for the respondents accused in Cri. Misc. Application No. 8574/2004, ld. Counsel Mr. KB Anandjiwala appearing for respondents accused in Cri. Misc. Application No.

8573/2004, ld. Counsel Mr. BC Dave, appearing for respondents accused in Cri. Misc. Application No.8574/2004, ld. Counsel Mr. Saqueel Qureshi appearing for respondents accused in Cri. Misc. Application No.8575/2004 and ld. Counsel Mr. HR Prajapati appearing for respondents accused in Cri. Misc. Application Nos.8576/2004 and 8577/2004. However, main arguments have been advanced by ld. Counsel Mr. BB Naik for the respondents accused in Cri. Misc. Application No.8572/2004, which arguments have been supplemented by the ld. Counsel appearing for the respondents accused in rest of the Cri. Misc. Applications.

4. Those orders of bail granted to the respondents accused are challenged on various grounds mentioned in the memo of Cri. Misc. Applications and ld. APP Mr. PR Abichandani has taken this Court through the litigrity of facts emerging from record and especially CC A/c Nos. 49 & 50 opened and operated by the Management of the Bank. To be precise, the arguments if are placed as grounds pressed into service by the ld. APP Mr. Abichandani, can be noted as under:-

> (i) That the ld. Sessions Judge ought to have further appreciated the fact that this Cash Credit Facility (CC Facility for short) in Account No. CC 49 and 50 was disbursed and thereafter the

resolution was lately passed on 05.11.1999, i.e. after 35 days of disbursement of the amount by the Board of Directors.

(ii) That the ld. Sessions Judge has materially erred in not appreciating the fact that the account namely Lakhiya Brothers C.C.A.2513 was opened on 16.08.1999 and in very short time, the OD facility extended was to the tune of Rs.82 Lacs. This was clearly in breach of the Rules and Regulations laid down by RBI and Co.Operative Society. The investigation so far reveals that to undo the illegality, further illegality was committed and a loan to the amount of Rs.42 Lacs was disbursed to a new account namely Lakhiya Brothers, Proprietor Milind R.Patel CC 49 and a loan of Rs.42 Lacs was disbursed to Bapunagar Auto Centre, Proprietor C.C.50.

(iii) That the ld. Sessions Judge has materially erred in not appreciating the fact that during the course of investigation, it has been revealed that there is no person namely Milind R.Patel, but there is a person namely Milind N.Patel, who is at America since last one and half year. Further, during the course of investigation, it has been revealed that some of the amount was deposited in account of Lakhiya Brothers and Bapunagar Auto on behalf of M.R.Patel- who is nothing but a name used to open a bogus account.

(iv) That the ld. Sessions Judge has materially erred in ignoring the vital fact that the cheques and the vouchers through which the transactions have been carried out in C.C.49 and 50 are not found in the Bank premises and are not traceable.

(v) That the ld. Sessions Judge has materially erred in not appreciating the fact that there is likelihood of the accused fleeing away and not being available at the time of trial.

(vi) Even otherwise, the ld. Sessions Judge has materially erred in not appreciating the fact that the entire illegal transactions have been conducted by disbursement of loan in the name of the members, who do not exist, that too without any application and/or any relevant documents ins support of such application and shockingly, without passing of any requisite resolution, prior to the disbursement, sanctioning such a loan amount. Surprisingly, the

accused persons and/or Board of Directors have managed to pass a resolution after more than a month of disbursement of loan amount in a fictitious and/or bogus account. The ld. Sessions Judge in para-12 has recorded these facts, yet has ignored the said facts only on the ground that the amount has been deposited in the Bank.

(vii) It would not be proper to say that the case of the prosecution is based on documentary evidence and little scope of playing with evidence. On the contrary, the case of the prosecution is also based on the statements of various important witnesses like Shri Naginbhai Patel, Shri Devidas Bhadani and Shri Dilipbhai Shah etc. Some witnesses shall have to be examined by the Court with a view to bring and produce important relevant documents and mode of proof of documents obviously would be as per the scheme of Indian Evidence Act and when respondents accused were in the managerial team, they can ably influence their once subordinate staff members. Ld. Sessions Judge, thus has not applied its mind while exercising discretion enlarging the accused on bail.

(viii) Mr. Abichandani has further submitted that in view of the decision of the Apex Court, it has become difficult for the prosecution to enter into thorough investigation because some of the accused were not either arrested or named in the crime first registered with DCB Police Station i.e. I.CR No.8/2003 and they came to be arrested in the second offence i.e. I.CR No.52/2004. It is, therefore, not possible for the investigating agency to arrest any of the accused persons afresh and interrogate any of them because technically they had been arrested and enlarged on bail by the Competent Court.

(ix) It is submitted further that the ld. Sessions Judge, while enlarging the respondents accused on bail, could not have considered the order of this Court granting bail vide order dated 21.07.2003 because the same is based on one material aspect that the investigation is over and the role of the respective accused is found materially different than of Chairman. So, without entering into the discussion as to the role and responsibility of the respondents accused have been granted bail by this Court vide order dated 21.07.2003 in the case of the respondents of crime being I.CR.No. 8/2003 and, therefore, the

ld. Sessions Judge ought not to have given any weightage to the said order.

5. I am convinced that there is enough strength in the case of the Bank against respective accused persons and in reference to the role played by them qua the fraud played by opening, operating and disbursing the amount in CC A/c Nos.49 & 50 from 01.01.1999 to 19.08.2004. The details are shown to the Court in this regard from the papers of investigation.

6. According to ld. APP Mr. Abichandani, this is a case where ld. Sessions Judge ought not to have exercised discretion in favour of the respondents accused because the criminals have ruthlessly defrauded not only the Bank, but each investor who had deposited his life-time saving putting tremendous faith on the concept of Co.Operative Movement under which Co.Op. Banks are established and being run from the members selected and elected of such Co.Op. Banks.

7. The arguments advanced by ld. APP Mr. Abichandani have been assailed on various grounds by the ld. Counsel Mr. BB Naik appearing for the respondents accused who has addressed the Court at length and has taken this court through the orders passed by the Apex Court dated

31.01.2005 in Special Leave Petition (Cri.) Nos. 407 & 408 of 2005. The finding recorded by the Apex Court nullifies the effect of the arguments made by the ld. Addl. PP Mr. Abichandani that some of the respondents accused were not arrested in the earlier offence registered as I.CR No.8/2003 and some of them are not named in subsequent crime registered as I.CR No.55/2004 and 56/2004. It emerges clearly from the record that under a larger conspiracy, the Bank has been defrauded and now after the decision of the Apex Court in the above referred Special Leave Petition (Cri.) dated 31.01.2005, the police has filed consolidated chargesheet against all the accused persons for defrauding the Bank by granting bogus loans or for operating fictitious and bogus accounts and even for granting loans without proper security and guarantee. Obviously, therefore, the enlargement of the accused in any one of the crimes registered by the DCB Police Station, shall have to be construed as bail granted in the offences registered by DCB Police Station as to the Bank scam by the chairman, board of directions and respective officials of the Bank who were concerned with the management of the Bank.

8. The law as to grant of bail is materially different than the law as to cancellation of bail. Ld. Counsel Mr.

BB Naik has pointed out that this Court has enlarged accused persons on bail on stringent conditions in the month of July-2003. The Chairman whose role and responsibility is distinguishable from the papers of investigation, is enjoying some protection granted by the Apex Court. The bail granted to the accused persons should not be cancelled merely because it relates to a bank scam.

9. It is relevant to note that all the respondents accused have remained with police and custodial interrogation was possible immediately after their respective date of arrest. In some of the cases, after arrest, investigating agency had prayed for police remand and request to grant police remand has been rejected. These orders of rejection of remand applications have not been assailed and the Chairman or Directors who were with police in police custody, have been interrogated thoroughly and on the strength of the clues received from the accused persons arrested, the investigating agency has recovered number of documents and traced out various sham transactions. Mr. Naik has pointed that remand applications were rejected on 13.08.2004 and the modus of defrauding the bank pointed out by the prosecution mainly centers around the Chairman and it is

difficult to infer that any of the respondents accused were directly a party to such fraud.

10. While dealing with cancellation of bail applications, this Court is supposed to consider, as submitted by ld. Counsel Mr. BB Naik, the passage of time. When the accused persons are enjoying bail since about 10 to 11 months, their bail should not be cancelled on the eventualities which were already there on the day on which bail was granted to respondents accused. The fact that certain important documents are not traceable is a serious allegation, but according to ld. Counsel Mr. Naik, this ground was very well there even on the day on which the respondents accused were granted bail and the prosecution is not able to point out that any of the respondents accused is responsible for playing with any important documentary evidence. It is true that some important witnesses also shall have to be examined by the prosecution, but there is enough strength in the say of ld. Counsel Mr. Naik that most of the evidence is in the nature of bank accounts and their operation. Large number of relevant documents have been seized and they are now forming part of the chargesheet. So, there is very little scope for the accused to disturb the case of the prosecution and in this background, time passage

between the date of grant of bail and request that has been pressed into service by the prosecution today, is relevant and requires to be considered. On the contrary, on the date of leading of oral evidence, subordinate staff would be under control of the Administrator or Liquidator and it would be difficult for any of the accused to influence any of them. All the grounds above-mentioned, according to ld. Counsel Mr. Naik, were placed before the ld. Sessions Judge and they have been considered. When there is no legal scope to obtain police remand of any of the accused in view of the scheme of section 167 of CrPC and more than one decision of the Apex Court, it would not be either legal or proper to keep any of the accused persons in prison pending trial because it would be nothing but incarceration without formal conviction. Rejection of bail should not be of punitive nature. The persons who were Directors in the year 1999 and thereafter, were not part of management, how can influence any of the prosecution witness is also a question and when practically all the accused have remained in custody for about 20 days, the police could have even interrogated them by visiting them in jail. At all possible places, raids were carried out by the investigating agency and it is not the case of the prosecution that anything incriminating was found at the

instance of any of the respondents accused. The conditions imposed by the Court i.e. by this Court while passing bail orders on 21.07.2003 and by ld. Sessions Judge vide orders under challenge are stringent and respondents accused are supposed to co-operate with the trial in all manner. In that fact situation, after filing of the chargesheet i.e. conclusion of investigation, bail granted before 10 to 11 months should not be cancelled.

10. One Mr. MR Patel i.e. Milind R.Patel referred to by ld. APP Mr. Abichandani is not traceable and it is the allegation that this name is fictitious in whose name CC A/c Nos. 49 & 50 have been opened and operated by one Satish Borasia, is the serious allegation. In the same way, the facts narrated by one of the witness namely Shri Devidas Thakordas Badami in his statement also reveal that material irregularities were being committed with an ulterior motive to cheat the Bank. Because of number of various applications for bail, preferred by the persons arrested, at two different places i.e. in this Court and the Court of Sessions at Surat, the Investigating Officer was not able to co-ordinate the investigation ably and, therefore, in some serious cases, appropriate steps for obtaining remand could not be taken. However, this arguments on behalf of the

prosecution, I am afraid, would not help the petitioner State in getting the bail cancelled. It is not the say of even ld. APP Mr. Abichandani that any of the conditions of bail has been violated by the respondent accused. It is true that the court should be conservative in granting bail in a large scale financial scams and especially when the public money is found involved, but when a competent court has exercised discretion after considering the totality and also earlier orders passed by this Court enlarging the accused persons on bail, then in that facts situation, though the case technically may not be said to be the case worth consideration on the ground of parity, the ld. Sessions Judge can not ignore this fact situation as one of the relevant factor and the bail/personal liberty of the Chairman heading the managerial team, I am told, is hanging with a litigation pending before the Apex Court. So, I am not inclined to accept the plea placed by the State praying cancellation of bail.

12. It is possible to pass certain comments on the case of the prosecution as well as on the stand taken by ld. Counsel Mr. BB Naik on behalf of the respondents accused, but I am afraid, that comments may cause prejudice to either side and as per settled legal position, when the

bail Court is not supposed to evaluate the evidence and some shifting is permissible, in the same way, the Court dealing with application for cancellation of bail also should restrain itself in evaluating strength of the case of the prosecution or defence. On the contrary, the strength in the discretionary order only requires to be seen in the background of the law on the point of cancellation of bail. When, arrest in a single case registered by DCB Police Station is considered as an arrest in all the offences registered, and the bail granted in one case, obviously therefore, shall have to be construed as bail granted on merits in all crimes when a consolidated chargesheet is filed and plea of cancellation of bail on this ground is also not found sustainable.

13. Considering the date of order of bail and the fact that respondents accused has not violated any of the conditions of bail imposed by the Court while releasing them on bail, this Court is not inclined to disturb the order of bail because after lapse of about 10 to 11 months, it would not be justified and proper to cancel the bail. Yardsticks for grant and cancellation of bail are quite different. In cases where discretion is exercised in a judicial manner, the order of bail

normally should not be disturbed and such powers vested with this court under section 439(2) of CrPC can be exercised in exceptional and grave cases. While dealing with such application, the Court is supposed to consider the totality including the quantum of punishment that can be imposed in the event the accused is found guilty.

14. It is true that the case of the prosecution is comparatively strong on merits against some of the respondents, but that by itself would not make the order of bail erroneous because the gravity of the offence is one of the aspect which requires consideration. I am told that consolidated chargesheet filed by the police runs into 3 to 4 big volumes. So, the trial in the present case is likely to protract for long time to come. So, cancellation of bail, I am afraid, would become punitive then preventive.

15. In more than one decision, the Apex Court has observed that while dealing with the cancellation of bail application, the Courts are supposed to consider the events that has occurred or likely to occur after the orders of bail. Of course, the facts are materially different, but the ratio of the decisions of the Apex Court in the cases of **(i) Samarendranath Bhattacharyaji**

v/s State of West Bengal, 2004 Cr.LJ 4215 (SC), (ii) Nityanand Rai v/s State of Bihar & Others, 2005(2) Crimes 102 (SC), and (iii) Aslam Babalal Desai v/s State of Maharashtra, AIR 1993 SC 1, can not be ignored when the role of some of the petitioners would become debatable at the time of trial. As per the settled legal position, the grounds for cancellation of bail under section 437(5) and under section 439(2) of CrPC are accidental namely (i) where the accused misuses his liberty by involving in the same or similar criminal activities, (ii) where he interferes with the course of investigation, (iii) where he tampers with the evidence of witnesses, (iv) where he threatens the witnesses or indulging in such activities or attempts to place himself beyond the reach of his surety, (v) where there is likelihood of jumping of bail etc. Thus, cancellation of bail by going into the merits of the case and giving finding on factual issue would be improper. The grounds for cancellation of bail could be those which arose after the grant of bail and should relate to the conduct of the accused while on bail. It is true that the present offence is the offence falling under chapters 17 & 18 of IPC, but the ratio of the Apex Court in the case of **Dolatram reported in 1995(1) SCC 349** can not be ignored.

16. In view of the observations made by the Hon'ble Supreme Court in the case of **Bhagirathsinh Jadeja v/s State of Gujarat, reported in AIR 1984 SC 372,** I see no such exceptional circumstances prevailing in the present case to cancel the bail. The Apex Court while dealing with the case of **Kashmira Singh v/s Duman Singh, reported in AIR 1996 SC 2176,** has observed that even rejection of bail application twice could not be made ground for cancellation of bail. Thus, the Apex Court has remained conservative in cancelling the bail granted earlier on merits. In the case of **Subhendu Mishra v/s Subratkumar Mishra, reported in AIR 1979 SC 3026,** the Apex Court has observed that cancellation of bail done in a mechanical manner is not sustainable. In view of above, discretion exercised for grant of bail is absolutely, just, legal and proper and requires no interference.

17. For short, there is no merits in all these Cri. Misc. Applications and the same is hereby dismissed. Notice discharged in all the Cri. Misc. Applications, if any.

[C.K. BUCH, J]

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